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ENGTEX MARKETING SDN BHD

v.

ZINMA HOUSING DEVELOPMENT SDN BHD & ANOR

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HIGH COURT MALAYA, JOHOR BAHRU
HUE SIEW KHENG JC
[ORIGINATING SUMMONS NO: (MT-5) 24-3368-2008]
15 MAY 2009

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COMPANY LAW: *Winding up - Petition - Disposition of property - Company disposing of property before date of petition - Registration of transfer effected after presentation of petition and winding up - Whether not a court-approved disposition - Whether disposition and transfer void - Material date of transaction - Whether date of transfer and not date of registration - Companies Act 1965, s. 223 - Applicability*

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LAND LAW: *Indefeasibility of title and interests - Sale and purchase of property - 2nd defendant purchasing property without notice of earlier sale to plaintiff - Whether a bona fide purchaser for value - Equitable interest of plaintiff under earlier sale agreement - Whether could override registered interest of 2nd defendant under latter agreement - Whether indefeasible title passed to 2nd defendant - National Land Code, s. 340(1), (2)(b)*

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On 23 September 1997, the plaintiff purchased two lots of land from the 1st defendant. The 1st defendant did not execute a valid transfer or deliver vacant possession of the properties, and the plaintiff filed a suit for specific performance of the same. The plaintiff, however, did not lodge any caveat against the properties. Subsequently, on 20 February 2006, the 1st defendant executed a statutory transfer to the 2nd defendant *vide* Form 14A National Land Code ('NLC') in respect of one of the two lots of land, and by that sold and transferred the said lot to the 2nd defendant ('the said property'). On 21 June 2006, the plaintiff petitioned for the winding up of the 1st defendant, and on 21 March 2007 the 1st defendant was wound up. The winding up notwithstanding, on 23 March 2007, the instrument of transfer of the said property to the 2nd defendant was duly registered. The plaintiff alleged that the registration of the said transfer on 23 March 2007, having been effected after the date of the winding up petition of 21 June 2006, was not a court-approved disposition pursuant to s. 223 of the Companies Act 1965 – and was hence void. It was further averred that the 2nd defendant purchaser, upon the authority *inter*

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alia of *Seek Lai Neo & Anor v. Cheng Chuan Development Sdn Bhd & 2 Ors*, had not acquired an indefeasible title to the said property under s. 340 of the NLC. Opposing the plaintiff's attempt to revoke the aforesaid registration, the 2nd defendant argued that s. 223 did not apply as the disposition took place prior to the commencement of the winding up petition on 21 June 2006 – namely upon the execution of Form 14A on 20 February 2006. It was the 2nd defendant's stand that he was for all intents and purposes a purchaser in good faith, and had therefore acquired an indefeasible title to the said property.

Held (for the 2nd defendant):

- (1) In determining whether s. 223 of the Act applies, the time of disposition is crucial. As laid down in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* and *Ong Ban Chai & Ors v. Seah Siang Mong*, the material time is the time of the transaction. (para 18)
- (2) In the present case, the date of transfer *vide* Form 14A, which was 20 February 2006, was the material time of the disposition of the said property. Registration was only effected on 23 July 2007 because, as explained by the 2nd defendant, the transfer could not be registered until the last of the caveats (lodged by other caveators) was removed. Section 223 of the Companies Act clearly did not apply as the disposition of the said property was done a good four months before the presentation of the winding up petition on 21 June 2006. (para 19)
- (3) Some portion of the relevant paragraph in *Seek Lai Neo & Anor v. Cheng Chuan Development Sdn Bhd & 2 Ors* had not been referred to by the learned counsel of the plaintiff in her submission. In any case, the same principle as applied in that case applied here. Consequently, the argument that the 1st defendant, having been wound up on 21 March 2007, had no authority to transfer the property to the 2nd defendant, resulting in the transfer to the latter being void under s. 223 of the Companies Act, which in turn rendered the instrument effecting such disposition equally void under s. 340(2)(b) of the NLC, was only sustainable as against the 1st defendant. The argument could not apply to the 2nd defendant, particularly so when there was no allegation of misrepresentation or fraud having been alleged against him or that he had acted

- A in concert with the 1st defendant to effect the disposition while aware that the latter had no authority to do so. In the circumstances, the 2nd defendant could only be a purchaser for value, and by virtue of the transfer of the property to him, became the registered proprietor thereof. Under s. 340(1)
- B NLC, his title was indefeasible. (paras 22, 23 & 24)
- (4) The 2nd defendant too became the registered proprietor of the said property free from all encumbrances after obtaining the Surat Kebenaran from the State Authority (the said property being a Bumiputra lot). The equitable interest of the
- C plaintiff under the 1997 agreements for sale of the said property clearly could not prevail over the registered interest of the 2nd defendant in respect of the said property. The plaintiff's remedy in the circumstances could only lie in
- D damages against the 1st defendant. (paras 26 & 27)

Case(s) referred to:

- Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 FC (refd)
- Kang Wah Construction Sdn Bhd v. Delta Enterprise & Anor* [1998] 1 LNS 55 (refd)
- E *Karupiah Chettiar v. Subramaniam* [1971] 1 LNS 43 FC (refd)
- Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 CLJ 108; [1987] CLJ (Rep) 254 SC (refd)
- Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637 CA (refd)
- F *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 FC (refd)
- Registrar of Titles, Johore Temenggong Securities Ltd* [1976] 1 LNS 135 (refd)
- Seek Lai Neo & Anor v. Cheng Chuan Development Sdn Bhd & 2 Ors* [1994] 4 BLJ 396 HC (refd)
- G *Teh Bee v. Maruthamuthu* [1977] 2 MLJ 7 (refd)
- Temenggong Securities Ltd* [1976] 2 MLJ 44 (refd)

Legislation referred to:

- Companies Act 1965, ss. 223, 226(3)
- National Land Code, s. 340(1), (2)(b), Form 14A
- H Companies Act [Sing], s. 259
- For the plaintiff - Lua Ai Siew; M/s Soo Thien Ming & Nashrah*
For the 1st defendant - Azmi Mashood (Cik Aklima with him)
For the 2nd defendant - Dr Wong Kim Fatt; M/s Gulam & Wong
- I [Editor's Note: By order dated 2 June 2011, the Court of Appeal in Appeal No. J - 02 - 1253 - 2009, set aside the decision of the High Court dated 15 May 2009.]

Reported by Wan Sharif Wan Ahmad

JUDGMENT**Hue Siew Kheng JC:**

[1] By an originating summons (OS) dated 11 November 2008 (encl. 2) the plaintiff sought the following orders:

- a) Pendaftaran pindahmilik melalui no. perserahan 17339/2007 bertarikh 23.3.2007 ("Pindahmilik tersebut") berkenaan Hartanah yang dipegang di bawah HS (D) 427411 Lot PTD 19632 (dahulunya HS(D) 124838 Lot 19632) Mukim Senai-Kulai, Daerah Johor Bahru, Negeri Johor berserta rumah-kedai 2 tingkat di atasnya ("Hartanah tersebut") daripada Zinma Housing Development Sdn. Bhd. kepada Lee Pei Yau dibatalkan;
- b) Pendaftar Hakmilik diarah untuk membatalkan pendaftaran Pindahmilik tersebut;
- c) Kos dibayar oleh Pengarah-pengarah syarikat Defendan Pertama yang melaksanakan suratcara Pindahmilik tersebut, iaitu, Lee Kim Bo dan Wong Jeok Lan kepada Plaintiff di sini; dan
- d) Relif-relif yang lain dan selanjutnya yang dianggap sesuai dan berpatutan oleh Mahkamah yang mulia ini.

[2] The plaintiff's application was supported by the affidavit in support (encl. 3) of one Lee Hen Heng, a director of the plaintiff company. The 2nd defendant filed an affidavit in reply on 5 March 2009.

Brief Background

[3] On 23 September 1997, the plaintiff had by two (2) sale and purchase agreements (exh. EMSB1 of encl. 3) purchased from the 1st defendant two lots of land, one of which is the said property (hartanah tersebut) Lot 19632 for a total sum of RM700,000 at RM350,000 per lot. The plaintiff paid the full purchase price by contra account.

[4] The 1st defendant failed to execute a valid and registrable memorandum of transfer and deliver vacant possession of the two properties to the plaintiff according to the terms of the sale and purchase agreements. Consequently, the plaintiff filed suit *vide* Johor Bahru High Court Civil Suit No. 22-732-2000 for, *inter alia*, specific performance of the two agreements.

A [5] On 20 February 2006, the 1st defendant executed the transfer in Form 14A of the National Land Code (NLC) in favour of the 2nd defendant for the consideration of RM200,000 in respect of the said property. Since that day, the 2nd defendant has been in possession of the said property and its issue document of title.

B [6] On 21 June 2006, the plaintiff commenced winding up proceeding against the 1st defendant *vide* Johor Bahru High Court Companies Winding Up No. 28-131-2006. The 1st defendant was wound up on 21 March 2007, with the official receiver duly appointed as the liquidator.

C [7] Leave was obtained by the plaintiff on 31 January 2008 pursuant to s. 226(3) of the Companies Act 1965 to continue with the proceedings against the 1st defendant.

D **The Plaintiff's Contention**

E [8] The gravamen of the plaintiff's claim is premised on the registration of the transfer of the said property by the 1st defendant to the 2nd defendant being effected on 23 March 2007 which is after the date of the winding up petition filed in court ie, on 21 June 2006. As such the plaintiff contends that the purported transfer was void as it was not a court-approved disposition pursuant to s. 223 of the Companies Act 1965.

F Section 223 provides as follows:

G Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the Court otherwise orders be void.

H The case of *Kang Wah Construction Sdn. Bhd. v. Delta Enterprise & Anor* [1998] 1 LNS 55 was cited in support of its proposition that third parties can obtain no valid right or title as a result of an unapproved disposition.

I [9] It was further argued on behalf of the plaintiff that the non-lodgment of a private caveat over the said property was a non-issue here as the instant case is not one of conflict of interest but whether s. 223 of the Companies Act applies.

[10] The plaintiff also contends that the 2nd defendant had not acquired an indefeasible title to the said property pursuant to s. 340 of the National Land Code as the 2nd defendant had failed to prove that he was “a purchaser in good faith” and that the purchase was “for valuable consideration”.

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The 2nd Defendant’s Position

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[11] The 2nd defendant’s stand was very simple: s. 223 of the Companies Act did not apply in this case as the disposition of the said property was before the commencement of the winding up petition. The 2nd defendant relied on the plaintiff’s own exhibit in exh. EMSB5 (at p. 99 of the O.S.) the Form 14A wherein it is clearly stated that the 1st defendant, Zinma Development Sdn. Bhd, for the consideration of RM200,000, receipt of which is acknowledged, had transferred the said property to the 2nd defendant on 20 February 2006.

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[12] Exhibit EMSB5 is the plaintiff’s official search at the Land Office and it was argued that the plaintiff cannot now deny the Form 14A that was executed by the 1st defendant in favour of the 2nd defendant. It was also argued that the disposition of the said property was effected on 20 February 2006 as shown on the Form 14A.

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[13] The 2nd defendant averred that as no private caveat had been lodged by the plaintiff over the said property, he had no knowledge of the winding up petition against the 1st defendant, (see para 3 and 5 of the 2nd defendant’s affidavit).

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[14] In para 4 of the same affidavit, the 2nd defendant had averred that as there were caveats entered by other caveators (but not the plaintiff) against the said property, the transfer could not be registered until after the last caveat was removed on 24 January 2007. Corroborative evidence was once again found in exh. EMSB5.

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Findings Of Court

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Whether s. 223 Of The Companies Act Applies

[15] Learned counsel for the plaintiff highlighted the commentary in “*The Companies Act of Singapore An Annotation*” by Andrew Hicks and Walter Woon wherein the authors commented on s. 259 of the Singapore Companies Act (which is in *pari materia* with s. 223 of the Malaysian Companies Act) as follows:

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- A The legislative intent of the section is to enable the liquidator to recover the property: *Re Mal Bower's Macquarie Electrical Centre Pty Ltd* [1974] 1 NSWLR 214, 258. In *Gorringe v. Irwell India Rubber & Gutta Percha Works* [1886] 34 Ch 128 where an assignment of a debt before commencement of winding up was not notified to the debtor until after commencement the section was held not to apply as the assignment was complete before commencement.
- B In *Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Sdn Bhd* [1987] 1 MLJ 56, 66 where transfers of land were executed before, but registered under the National Land Code 1965 (No 56 of 1965) after commencement, the dispositions were made at the date of registration and so were void under s. 259.
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They went on further to elaborate that:

- D Dispositions are void “unless the Court orders otherwise”. Each case is dealt with on its own facts and circumstances, especially the good faith and honesty of the persons concerned, and the court may act on the judge’s opinion of what is just and fair: *Re Steane (Bournemouth) Ltd* [1950] 1 All ER 21, 25: applied in *Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Sdn Bhd* [1987] 1 MLJ 56, 75 (High Court, Malaysia), validating a void transfer, and citing also *Re Leslie Engineers Co Ltd* [1976] 1 WLR 292, 304 to the effect that in deciding the existence of good faith and honest intention the absence of knowledge by the transferee of the winding up petition is a very powerful factor in favour of validation.
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- F [16] The plaintiff’s contention is that s. 223 applies because the transfer was only registered on 23 March 2007 ie, after the presentation of the winding up petition relying on the case of *Lian Keow Sdn Bhd (supra)* as the material time of disposition was the date of registration.
- G [17] The Court of Appeal in *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637 declared itself bound by the Federal Court decision in *Pekan Nenas Industries Sdn. Bhd. v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793. Mokhtar Sidin (JCA) delivering the judgment of the court affirmed as follows:
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- I This case has been hailed to be a landmark judgment of the Federal Court where it rejected the proposition that one is not a *bona fide* purchaser unless one has paid the full purchase price under the contract of sale as propounded by the Court of Appeal in the *Aik Ming* case, on which the learned trial judge had based his decision. The Federal Court decided that to be a *bona fide* purchaser one should have contracted in good faith for value, and

that knowledge of an adverse claim is not fraud. **The material time is the time of the transaction.** We observe that the Federal Court found in favour of the intervener/purchaser ie, the appellant company, which paid the balance of the purchase price when the second caveat was still subsisting. Delivering the judgment of the Federal Court, Edgar Joseph Jr FCJ said at p 207:

The material time at which there must be knowledge or the means of knowledge is the **time of entry into the transaction.** (See *Kanssen v. Rialto (West End) Ltd* [1994] Ch 346; *Morris v. Kanssen* [1946] AC 459) (emphasis added)

[18] In determining whether s. 223 of the Act applies, the time of disposition is obviously crucial. As laid down in the Federal Court decision of *Pekan Nenas (supra)* and endorsed unequivocally by the Court of Appeal in *Ong Ban Chai (supra)* the material time is the time of the transaction.

[19] Here, there is undisputed evidence presented by the plaintiff itself that the date of transfer as shown in the memorandum of transfer in exh. EMSB5 is 20 February 2006. The contention of the plaintiff that the registration of the transfer which was effected only on 23 March 2007 is the material date is untenable and without merit as the Federal Court had clearly held that the material time is the time of the transaction. Edgar Joseph Jr. FCJ in fact had clarified that the material time is “the time of entry into the transaction”. In my judgment, the transfer of the property which was effected on 20 February 2006 is the material time of the disposition of the said property. Registration was only effected on 23 March 2007 because, as the 2nd defendant had explained, the transfer could not be registered until the last of the caveats lodged was removed. In my view therefore, s. 223 of the Companies Act does not apply because the disposition of the said property was done a good four (4) months before the presentation of the winding up petition.

[20] The plaintiff has cited the case of *Seek Lai Neo & Anor v. Cheng Chuan Development Sdn. Bhd. & 2 Ors.* [1994] 4 BLJ 396 to support its argument that the transfer from the 1st defendant to the 2nd defendant was void. Attention was drawn to the following:

A Held:

[2] The argument that the 1st defendant, having been wound up in 1988, had no authority to thereafter transfer the property to the 2nd and 3rd defendants, resulting in the transfer of the property to the latter in 1990 being void under s. 223 of the Companies Act, which in turn rendered the instrument effecting such disposition equally void under s. 340(2)(b) of the National Land Code (NLC), is only sustainable as against the 1st defendant. *The argument cannot apply to the 2nd and 3rd defendants, particularly so when there is no allegation of misrepresentation or fraud against them or that they had acted in concert with the 1st defendant to effect the disposition while aware that the latter had no authority to do so.*

The highlighted portion of the above paragraph was not referred to at all by the learned plaintiff's counsel in her submission.

D [21] The facts in *Seek Lai Neo's* case (*supra*) as set out in the head notes read:

In January 1984 the plaintiffs entered into an agreement with the 1st defendant, a housing developer, to purchase a shophouse (the property) for RM300,000 to be constructed by the latter. Pursuant to that the plaintiffs paid the 1st defendant RM160,000 and agreed to pay the balance in instalments. The plaintiffs defaulted in the instalments and by end of May 1984 the outstanding arrears stood at RM60,000. The 1st defendant then gave the plaintiffs notice to pay up, and on non-compliance thereof, had the agreement repudiated on 1 August 1984.

In November 1984, the 1st defendant executed an agreement with the 2nd and 3rd defendants and sold the property to the latter. In 1988 the 1st defendant was compulsorily wound up at the instance of its creditor. That notwithstanding, the 1st defendant went on to execute the instrument of transfer in respect of the aforesaid sale and on 19 December 1990 had the property effectively transferred to the 2nd and 3rd defendants. This transfer was executed without the knowledge of the Official Assignee.

The plaintiff sued the 1st defendant for specific performance or alternatively for damages for breach of agreement, alleging, *inter alia*, that the transfer of the property herein was null and void. Before the learned Judge the primary issues that arose were:

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(1) Whether the disposition of the property by the 1st defendant to the 2nd and 3rd defendants was void, with the result that no title had passed to the latter in respect of the property. A

(2) Whether the 2nd and 3rd defendants were *bona fide* purchasers for value and had therefore retained an indefeasible title to the property. B

(3) In any case, whether the Court ought to cancel the transfer and order that the property be reverted to the Official Assignee.

[22] In my view, the same principle enunciated in *Seek Lai Neo's* case applies here: the argument that the 1st defendant, having been wound up on 21 March 2007, had no authority to transfer the property to the 2nd defendant, resulting in the transfer of the property to the latter being void under s. 223 of the Companies Act, which in turn rendered the instrument effecting such disposition equally void under s. 340(2)(b) of the NLC is only sustainable as against the 1st defendant. C D

[23] The argument cannot apply to the 2nd defendant, particularly so when there is no allegation of misrepresentation or fraud against the 2nd defendant or that the 2nd defendant had acted in concert with the 1st defendant to effect the disposition while aware that the latter had no authority to do so. There is nothing disclosed in the O.S. or the affidavit in support alleging any fraud, misrepresentation or collusion on the part of the 1st and 2nd defendant. E F

[24] As such, the 2nd defendant can only be a purchaser for value, as he has deposed in his affidavit, and by virtue of the transfer of the property to him, he became the registered proprietor of the same and under s. 340(1) NLC, his title is indefeasible. G

[25] I concur with the submission of learned counsel for the 2nd defendant that the interest of the 1st defendant was divested on the transfer of the said property to the 2nd defendant on 20 February 2006 when the said property ceased to be an asset of the 1st defendant, (see *Karuppiah Chettiar v. Subramaniam* [1971] 1 LNS 43; *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135 and *Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 CLJ 108; [1987] CLJ (Rep) 254). H I

A Indefeasibility

[26] On 23 March 2007, the 2nd defendant, after obtaining the Surat Kebenaran No. 2261/2007 from the State Authority (the said property being a Bumiputra lot) became the registered proprietor of the said property free from all encumbrances. The plaintiff did not have or produce any Surat Kebenaran. In the circumstances of the case the 2nd defendant had acquired indefeasibility of title under s. 340 of the National Land Code 1965. The equitable interest of the plaintiff under the 1997 agreements for sale of the said property cannot prevail over the registered interest of the 2nd defendant in respect of the said property.

[27] The remedy of the plaintiff lies in damages against the 1st defendant only. The liquidator of the 1st defendant company cannot claim (and is not claiming) the said property as with effect from 20 February 2006, the said property does not form a part of the asset of the 1st defendant, (see *Teh Bee v. Maruthamuthu* [1977] 2 MLJ 7, 12, FC; *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526, 528 FC)

The plaintiff's application was accordingly dismissed with costs.

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